

FAMILY LAW DECISIONS, YEAR IN REVIEW
2021
(and a little bit of 2022)

Monahan v. Hogan, 138 Nev. Adv. Op. 7 (2/24/22).

Relocation

The statute at issue is NRS 125C.007, which contains NRS 125C.007(1)(the threshold test); NRS 125C.007(2)(the six relocation factors), and NRS 125C.007(3)(the burden of proof). The threshold test is made up of three parts. The second provision requires a parent seeking to relocate to establish that, “[t]he best interests of the child are served by allowing the relocating parent to relocate with the child.”

The Nevada Supreme Court concluded that this section requires the District Court to make specific findings regarding whether relocation would be in the best interest of the child – which should incorporate the best interest factors used in custody cases. These findings should then be tied to the District Court’s conclusion. Further, because no other burden of proof is specified, the default burden of proof – preponderance of the evidence – is the applicable burden and it applied to all three of the threshold provisions.

Note: When a relocating parent is already a primary physical custodian, every best interest factor need not be applied anew, as the relocating parent has already proven that he/she should have primary custody. NRS 125C.0065 requires a joint custodian who seek to relocate to also petition for primary custody. NRS 125C.006 – involving a parent with primary physical custody – does not require this additional step as the parent already has primary physical custody.

The District Court appropriately incorporated a prior best interest analysis from an order following a motion for change of custody. Although the party opposing the relocation objected to this procedure as producing “stale” results, he identified no factor which, if considered again, would weigh against relocation.

Romano v. Romano, 138 Nev. Adv. Op. No. 1 (1/13/22).

Child Custody

Consolidated appeals regarding modification of joint physical custody and child support obligations.

The Nevada Supreme Court unified the tests for modification of a joint or primary custody arrangement. The test now permits a trial court to modify custody only if: 1) there has been a substantial change in circumstances affecting the welfare of the child; and 2) the modification serves the best interest of the child.

Facts- The Parties stipulated to an MSA containing parenting provisions. The Parties agreed to Father having primary physical custody (90%) of the three oldest

children, and Mother having primary physical custody (95%) of the four youngest children. The Parties also agreed to child support, alimony and a property division.

Eight months later, Father moved to modify custody to reflect the Parties' actual timeshare and to modify child support based on an argument that Mother's income had changed by more than 20% based upon her receipt of alimony and interest income from the property division.

Both Motions were denied and the Supreme Court affirmed.

Notes: Except for the change in the test for modification, Rivero remains intact, including this instructive quote, “[A] party cannot agree to a custody timeshare and designation and then move to modify the designation without also seeking to modify the timeshare itself...”. See fn 3 of the Romano decision.

Senjab v. Alhulaibi, 137 Nev. Adv. Op. No. 64 (10/21/21).

Subject Matter Jurisdiction

Divorce jurisdiction requires mere residence and does not require an intent to remain in the state.

The Nevada Supreme Court reviewed the issue raised on appeal – subject matter jurisdiction – de novo. The Court reexamined the concept of residence as applied in the divorce context. Looking to the definition supplied by NRS 10.155, the Court determined that under NRS 125.020, “residence” is not synonymous with “domicile” and requires only “physical presence” to be satisfied. The extra-textual requirement of an intent to remain was not necessary and is not now required.

Byrd v. Byrd, 137 Nev. Adv. Op. No. 60 (9/30/21).

NRCP 60(b)(6)

Military Disability

Use of audiovisual appearance

- 1) The use of NRCP 60(b)(6) to set aside a part of a divorce decree four years after the fact, was not appropriate. Rule 60(b)(6) relief is available only in extraordinary circumstances which are not addressed in NRCP 60(1)-(5) and only as a means to achieve substantial justice. Movant's claims that her ex-husband misrepresented facts, sounded in either NRCP 60(b)(1) or (3), therefore NRCP 60(b)(6) is not available.
- 2) The District Court may not order the division of military disability. These benefits are subject to and completely pre-empted by Federal Law. Moreover, Shelton v. Shelton, is distinguishable. In Shelton, the party receiving military disability was ordered to pay certain sums to his ex-spouse. These sums were not ordered to be paid directly from the military disability benefits as the

source and the Court was clear in noting that there were sufficient other funds from which the payments could be made.

- 3) The Respondent was precluded from appearing via audiovisual means from the Philippines. The District Court must consider the relevant good cause factors set forth in SCR Part IX-B(B)(1)(6) and the policy in favor of allowing parties to appear by audiovisual means.

Pelkola v. Pelkola, 137 Nev. Adv. Op. No. 24 (5/27/21).

Relocation

The issue addressed by the Nevada Supreme Court was whether a parent must not only seek permission to relocate out of the state, but must seek permission to move from one place out of the state, to another place out of the state.

The Court concluded NRS 125C.006(1)(b) applies to both situations and specific findings under NRS 125C.007(1) and, if applicable, NRS 125C.007(2) must be made.

In re: Parental Rights as to T.N.R., 137 Nev. Adv. Op. No. 23 (5/27/21).

Trial Disclosures

NRCP 16.1, 16.2, and 16.205 apply to cover the range of civil proceedings, including termination of parental rights proceedings. Failure to disclose a non-expert witness prior to trial (in this case the disclosure actually came during trial) was tantamount to trial by ambush. However, because substantial evidence supported the order, the error was harmless.

In re: Parental Rights as to L.L.S., 137 Nev. Adv. Op. No. 22 (5/27/21).

Court Masters

Termination of parental rights cases (the “civil death penalty”) must be heard by a District Judge and may not be heard by a Court Master. This determination was based upon:

- 1) The fundamental importance of the rights at stake which implicate a parent’s Constitutional right to Due Process;
- 2) a District Court’s subsequent review of the trial record before a Court Master is not sufficient to safeguard the rights of the parent and child.

The Supreme Court applied a three part test to determine if due process was satisfied; 1) the parent’s interest; 2) the risk of erroneous deprivation against; 3) the government’s interest. (Note- this test does not address the child’s rights).